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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 215

OVERNITE TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–12a) is reported at 372 F. 2d 765. The findings of fact, conclusions of law, and order of the National Labor Relations Board (J.A. 10–31; 32–34) [1] are reported at 157 NLRB 1185.

JURISDICTION

The decision and judgment of the court of appeals were entered on February 6, 1967 (Pet. App. 1a), and a petition for rehearing *en banc* was denied on

[1] "J.A." references are to the portions of the record printed as a joint appendix in the court of appeals and filed with the Clerk of this Court.

April 4, 1967 (Pet. 2). The petition for a writ of certiorari was filed on June 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner, in purchasing a motor carrier business from another employer, succeeded to the latter's bargaining obligation with the union and thus violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally changing the employees' wages, hours, and working conditions.

2. Whether the Board's remedial order, requiring petitioner to restore the employees to their former working conditions and to make them whole for economic losses attributable to the unfair labor practice, was proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are printed at pp. 15a–16a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Rutherford Freight Lines, Inc. ("Rutherford"), an interstate motor vehicle common carrier, operated trucking terminals at Roanoke and Pulaski, Virginia (J.A. 11–12; 40). On February 6, 1963, Rutherford contracted to sell to petitioner ("Overnite") its operating rights, terminals, and all other assets, in-

cluding good will (J.A. 12; 208–223).[2] Thereafter, Overnite and Rutherford jointly applied for and obtained Interstate Commerce Commission ("ICC") approval of the sale (J.A. 195–202), and, on November 19, 1964, Overnite took over Rutherford's Roanoke and Pulaski operations (J.A. 12, 15; 42–43).

Rutherford—for a number of years prior to and immediately preceding the final consummation of its contract with petitioner on November 19, 1964—had recognized and negotiated with the Union[3] as bargaining agent for its Roanoke and Pulaski terminal employees (J.A. 14–15; 59–61; 68; 105–108). On August 27, 1964—after ICC approval of the sale but before the final transfer occurred—Rutherford's President McInturff made a request to the Union "that bargaining be resumed as soon as possible" since the existing collective bargaining agreement between Rutherford and the Union would expire by its terms on August 31, 1964 (J.A. 204). On the same day, in a letter addressed to McInturff (J.A. 202–203), the Union similarly urged a prompt commencement of bargaining for a new agreement, and requested a discussion respecting the "ramifications" of the ICC's July 31 approval of the impending sale, noting that, "if you have any intention of changing the operation of your Roanoke and Pulaski terminals in any respect, we should like to be notified of this

[2] Petitioner also agreed to hire, upon completion of the sale, Rutherford's president, Robert N. McInturff (J.A. 15, 216).

[3] Chauffeurs, Teamsters and Helpers Local No. 171, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

fact and to negotiate this matter with you. * * *."[4]

Thereafter, on October 20, 1964, the Union sent petitioner Overnite a letter requesting that it be notified "as to the exact date when you intend to consummate the contract with Rutherford"; the Union added that it represented the terminal employees and that all of those employees were interested in working for Overnite (J.A. 19, 144). Petitioner answered the Union on October 27, stating that no date for consummation had been set and that, to the extent the Union was seeking recognition, Overnite "would have to decline such recognition" because "any questions of union representation must be necessarily deferred to a later date" (J.A. 19–20; 146). Two days later, on October 29, the Union again requested that Overnite advise it "as soon as this decision [to consummate the contract] has been made" (J.A. 206).[5]

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[4] McInturff subsequently agreed with the Union that Rutherford would maintain, during negotiations for a new agreement, existing wages, hours, and working conditions for the Roanoke and Pulaski terminal employees, and that any new agreement executed by the parties would be retroactive to September 1, 1964 (J.A. 15; 39; 42–43, 63–64; 68, 131, 141, 205). Rutherford also continued to deduct union dues from the employees' salaries (J.A. 17; 68–71).

[5] Petitioner's counsel had received from Rutherford copies of the Union's August 27 letter (*supra*, p. 3), and all subsequent correspondence between the Union and Rutherford prior to the eventual transfer and takeover by Overnite on November 19, 1964 (J.A. 15, 21; 112–114). The Union also had appeared at the ICC hearings and argued, *inter alia*, that it was the collective bargaining representative for the terminal employees and that, if the sale were approved, Overnite should recognize the Union and continue existing wages and other terms and conditions of employment (J.A. 15; 18–21; 41, 226; 237–247).

During the afternoon of November 19, 1964, Overnite took over Rutherford's business. It immediately continued operations at the Pulaski and Roanoke terminals with "essentially the same" employees performing the same work under the same supervision as before (J.A. 12–14; 17–18; 21, 63; 82–94).[6] Overnite informed the terminal employees that afternoon that their hourly wage rate had been reduced from $3.05 to $2.60; that their 8-hour daily guarantee and overtime privileges had been eliminated; and that the employees would thereafter work under a different insurance and pension program, to which they would now have to make contributions (J.A. 13, 24; 63–66; 82–83).[7]

Although the Union repeatedly had requested advance notification of the final transfer, Overnite did not give such notice; instead, it mailed a letter to the Union's counsel on November 19 stating that Overnite was completing the transaction that same day (J.A. 20–21; 71–72, 147). The Union answered this letter

[6] Thus, Overnite "offered employment to all of the [terminal employees] and they all accepted" (J.A. 63). The Pulaski and Roanoke drivers, who "punched in on a Rutherford time card" the morning of November 19, "punched out on an Overnite time card" that afternoon (J.A. 82–83; 43). The terminal managers and supervisory personnel remained as before (J.A. 86–90; 92–94). Indeed, Rutherford's President McInturff, who had bargained with the Union before the takeover, bargained thereafter with the Union as "Assistant to the President" of Overnite (J.A. 102; 110–111).

[7] The terminal employees were also told by petitioner's spokesman that "Overnite took over today [and] as you all know we are not union and we are not planning on being union" (J.A. 13–14; 83, 87).

on November 20, again asking, *inter alia,* whether Overnite "intends to recognize" the Union and "observe and comply with the collective bargaining agreements" (J.A. 147–148). On November 30, Overnite replied that it was "willing to recognize and bargain" with the Union "in separate and appropriate units at Pulaski and Roanoke," but that the "Teamsters standard contracts [were] wholly unacceptable to [the] Company" (J.A. 16–17; 149–151; 154–155). Thereafter, the Union reiterated its position that "Overnite had no right to change the wages, hours and working conditions without notifying * * * and bargaining with [the Union, and should therefore] restore these changed conditions * * *" (J.A. 16; 69–70, 94–95). Petitioner refused to accede to these demands, and unfair labor practice charges against petitioner were subsequently filed.

B. THE BOARD'S CONCLUSIONS AND ORDER, AND THE COURT OF APPEALS' DECISION

The Board concluded that Overnite continued to operate, at the Roanoke and Pulaski terminals, the same "employing industry" as its predecessor Rutherford; that the Union had been, and continued to be, the collective bargaining agent for the unit of employees involved; and that Overnite violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages, hours and working conditions immediately upon takeover without affording the Union prior notice and an opportunity to bargain (J.A. 33; 21–23; 26–27). The Board rejected petitioner's contention

that the ICC order, approving the sale from Rutherford to Overnite, precluded the Board from issuing an order in the instant proceeding; the Board noted that the ICC "specifically made no findings or recommendations concerning the labor relations matters involved in the instant case" (J.A. 33, n. 2).

The Board ordered Overnite to cease and desist from the unfair labor practices found; to restore the Roanoke and Pulaski terminal employees to their former working conditions; to make them whole for any interim economic losses attributable to Overnite's unlawful, unilateral action; to bargain collectively, upon request, with the Union regarding wages, hours, and conditions of employment; and to post appropriate notices (J.A. 33; 27–31).

The court of appeals sustained the Board's findings that Overnite was a "successor" to Rutherford and that, under settled law, it "had a duty to bargain on the day of take-over" (Pet. App. 6a). The court further found that Overnite's "belated recognition" of the Union 11 days after the company unilaterally had instituted substantial changes in terms and conditions of employment did not purge its earlier unlawful conduct (*ibid.*). Finding Overnite's contention that ICC approval of the acquisition precluded the Board from acting to be "without merit," the court concluded that the Labor Board retained authority to protect the rights of the employees of the acquired company under the National Labor Relations Act (Pet. App. 9a). Finally, the court below held that the Board's order, requiring Overnite to

make the employees whole for losses caused by the unilateral changes, was neither "extraordinary" nor "a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act" (Pet. App. 9a–10a).[8]

ARGUMENT

1. Section 8(a)(5) of the Act, read together with Section 8(d), requires an employer to bargain collectively with the representative of his employees "with respect to wages, hours, and other terms and conditions of employment" (Pet. App. 15a–16a). It is settled that an employer violates this provision by unilaterally altering such employment conditions without prior consultation with the employees' bargaining agent.[9] It is equally settled, as the court below noted, that, "if the transfer of assets and employees from one employer to another leaves intact the identity of the employing enterprise, then the former's duty to recognize and bargain with an incumbent union devolves upon the latter as a 'successor employer'" (Pet. App. 5a-6a, citing seven supporting cases from six circuits). The facts summarized in the Statement (*supra*, pp. 5–6) fully support the

[8] One member of the court of appeals dissented with respect to the remedial provisions of the Board's order (Pet. App. 10a–12a).

[9] See, *e.g.*, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 209–211; *National Labor Relations Board* v. *Katz*, 369 U.S. 736; *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180, 186 (C.A. 4), certiorari denied, 317 U.S. 652; *National Labor Relations Board* v. *Central Illinois Public Service Co.*, 324 F. 2d 916 (C.A. 7).

Board's findings, sustained by the court below (Pet. App. 6a, 7a), that Overnite was the "successor" to Rutherford, that Overnite thus had a duty to bargain with the Union on the day of takeover, November 19, 1964, and that, in derogation of that duty, it unilaterally altered the employees' wages and other conditions of employment.

2. Contrary to petitioner's contention (Pet. 11–25), the Board's decision and order here do not impinge upon the jurisdiction of the ICC or contravene that agency's order approving the transaction. The Interstate Commerce Act (49 U.S.C. 5(2)(c)(4); Pet. App. 13a) directs the ICC, in passing upon the propriety of a proposed acquisition of one motor carrier by another, to "give weight," *inter alia,* to the "interest of the carrier employees affected." Petitioner's argument essentially is that this provision gives the ICC broad authority to impose conditions upon the labor relations practices of motor carriers whose mergers it approves; and that the Commission's exercise of such authority—here the Commission conditioned its approval of the sale of Rutherford's operating rights and assets to Overnite upon the latter's giving three months severance pay to employees displaced by the merger (J.A. 196, 202)—bars the Labor Board from applying the National Labor Relations Act to subsequent actions of the merged company that relate to labor problems that grow out of the merger.

The ICC, however, has never claimed or purported to exercise such broad authority. On the contrary,

the Commission views its authority over labor matters arising in connection with motor carrier mergers as relating primarily to the questions that customarily flow from such mergers, such as job security and severance pay. The ICC does not attempt in such proceedings to resolve any issues that might arise under the Labor Act relating to wages, hours or working conditions.[10] Indeed, as the Board noted (J.A. 33, n. 2; 195, 199), in approving this merger the ICC expressly stated that it "should make no findings or recommendations with respect to the labor relations problems" here involved.[11] The Board did not pur-

[10] The ICC has informally advised the Solicitor General that the foregoing statement fairly sets forth its position.

[11] Overnite states (Pet. 17) that "throughout every stage of the litigation" before the ICC, it maintained that the ICC had "complete jurisdiction over all of these matters." However, Overnite argued before the ICC (J.A. 246–247): "It is clear beyond question, therefore, that the Union's insistence upon recognition by [the petitioner] * * * of the Union and its contracts presents matters which are for determination by the Labor Board and the Courts rather than by the Commission * * *." (See also J.A. 241.)

In upholding the merger, the district court decided only (1) that the Interstate Commerce Act provides a broader measure of protection for employees of merging railroad carriers than for employees of merging motor carriers, and that this difference is not arbitrary; and (2) that the protection here provided—the grant of three months severance pay to displaced employees—was fair and equitable to both the carriers and the employees. *American Buslines, Inc.* v. *United States*, 253 F. Supp. 481 (D.D.C.), affirmed *per curiam, sub nom. Amalgamated Transit Union* v. *United States*, 385 U.S. 38. The government's motion to affirm similarly argued only those two points (Nos. 496, 497, 1966 Term, pp. 4–7).

The court of appeals' decision here does not conflict with *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*

port to change or supplement the protections granted by the ICC to employees affected by the merger. For this reason the court of appeals correctly held (Pet. App. 9a): "Whatever the ICC may do, the Labor Board retains full authority to provide further protection of employees in enforcement of the National Labor Relations Act," without conflicting with the jurisdiction of the ICC.[12]

3. There is no substance to petitioner's contention (Pet. 26–36) that the Board required it to engage in "anticipatory pre-purchase collective bargaining." The theory of the Board was not that Overnite refused to bargain when it received the Union's letter of October 20, 1964, notifying it that the Union represented the employees. Rather, the theory was that this letter, together with the other events summarized in the Statement (*supra*, pp. 4–6), placed Overnite on notice that the Union viewed it as the successor to Rutherford, who was required to bargain before making any changes in terms and conditions in employment after the date on which the sale was consummated, *i.e.*, November 19, 1964. And, as shown, Overnite unilaterally made such changes after that date without any bargaining with the Union.

Co., 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819 (see Pet. 24–25). That case merely involved the procedures to be followed by the parties, under 49 U.S.C. Sec. 5(2)(f), in adjusting seniority rights of railroad employees affected by the consolidation of two railroad yards.

[12] See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 173; *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 110.

4. Finally, petitioner errs in characterizing the Board's order as "unprecedented" (Pet. 37). The Board directed petitioner to restore its employees to the working conditions which prevailed before its unlawful action, to make whole its employees for interim economic losses, and to bargain with the Union regarding future working conditions (J.A. 33–34; 23–29). In cases involving similar violations, similar orders have been uniformly held to be within the Board's broad remedial power under Section 10(c) of the Act (29 U.S.C. 160(c)).[13]

[13] *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215–217; *National Labor Relations Board* v. *Preston Feed Corp.*, 309 F. 2d 346, 351, 352 (C.A. 4); *Central Illinois Public Service Co.* v. *National Labor Relations Board*, 324 F. 2d 916, 919–920 (C.A. 7).

Cooper Thermometer Co. v. *National Labor Relations Board*, 65 LRRM 2113 (C.A. 2, April 21, 1967), relied upon by petitioner (Pet. 45), is distinguishable. In *Cooper* the employer transferred his plant to a new location 54 miles away, chiefly because of the lower wage rates prevailing at the new location. The court sustained the Board's finding that the employer violated the Act by failing to bargain with the union about the transfer of the old employees to the new location; and it ruled that, as remedy for this violation, the Board properly required the employer to reimburse the employees for any loss of pay resulting from the refusal to bargain. However, the court concluded that, because of the special factual situation there involved, including the "difficulty in determining who would have transferred under proper bargaining" (*id.*, at 2119), the reimbursement should be computed on the basis of the new, rather than the old rates. Here, on the other hand, as in *Fiberboard*, *supra* (which the court in *Cooper* distinguished), there are no such special circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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